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No. 93-682

In the Supreme Court of the United States

OCTOBER TERM, 1993

MILLARD PROCESSING SERVICES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board reasonably concluded that the conduct of a cable television reporter in videotaping a union rally the day before a Board election did not, in the circumstances of this case, create an atmosphere of fear and coercion that precluded the employees from exercising a free choice in the election.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Advanced Mining Group, 260 N.L.R.B. 486 (1982), enforced mem., 112 L.R.R.M. (BNA) 2793 (D.C. Cir. 1983)	9
Anchor Inns, Inc., 262 N.L.R.B. 1137 (1982)	6
Belcher Towing Co. v. *NLRB*, 726 F.2d 705 (11th Cir. 1984)	8
Crown Coach Corp., 284 N.L.R.B. 1010 (1987)	6
DID Building Servs., Inc. v. *NLRB*, 915 F.2d 490 (9th Cir. 1990)	11
Haynes Indus., Inc., 232 N.L.R.B. 1092 (1977)	10
Hedstrom Co., 223 N.L.R.B. 1409 (1976) enforced and remanded, 558 F.2d 1137 (3d Cir. 1977)	11
Hit 'N Run Food Stores, 231 N.L.R.B. 660 (1977)	9
M & M Supermarkets, Inc. v. *NLRB*, 818 F.2d 1567 (11th Cir. 1987)	11
Mike Yurosek & Sons, Inc., 292 N.L.R.B. 1074 (1989)	8
Millard Processing Servs., Inc., 308 N.L.R.B. 929 (1992)	6
NLRB v. *Computed Time Corp.*, 587 F.2d 790 (5th Cir. 1979)	8
NLRB v. *Golden Age Beverage Co.*, 415 F.2d 26 (5th Cir. 1969)	10
Nu Skin Int'l, Inc., 307 N.L.R.B. 223 (1992)	5, 8
Pepsi-Cola Bottling Co., 289 N.L.R.B. 736 (1988)	4, 6, 8
Steak House Meat Co., 206 N.L.R.B. 28 (1973)	6

Cases—Continued:

	Page
Sunbelt Mfg., Inc., 308 N.L.R.B. 780 (1992), enforced mem., 996 F.2d 305 (5th Cir. 1993)	4-5
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951)	9, 10
Universal Mfg. Corp., 156 N.L.R.B. 1459 (1966)	11
Wm. Chalson & Co., 252 N.L.R.B. 25 (1980)	9

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 8(a)(1), 29 U.S.C. 158(a)(1)	6
§ 8(a)(5), 29 U.S.C. 158(a)(5)	6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-15a) is reported at 2 F.3d 258. The decision and order of the National Labor Relations Board is reported at 308 N.L.R.B. 929. The underlying decision and certification of representative (Pet. App. 16a-25a) is reported at 304 N.L.R.B. 770.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on July 30, 1993. The petition for a writ of certiorari was filed on October 28, 1993. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a bacon processing facility in Omaha, Nebraska. On May 8, 1990, Local 271, United Food and Commercial Workers International Union (Union) filed a petition with the Board's regional office for a representation election in a unit consisting of petitioner's approximately 240 production, maintenance, and sanitation employees. Pet. App. 26a; Pet. 3 n.1. Petitioner and the Union thereafter entered into a stipulation, approved by the Board's Regional Director, to hold an election in the unit on June 29, 1990. Pet. App. 26a.

Patrick O'Neill, the Union's general organizer during the election campaign, contacted four television stations regarding the campaign. Pet. App. 17a. O'Neill also instructed Felipe Morales, a union representative, to contact Fernando Castillo, the assistant director of Information and Service Network (ISN). ISN is a local company that produces programming for one of those stations. Pet. App. 4a-5a.[1] Morales informed Castillo that the Union was planning to hold a rally outside petitioner's plant on June 28. After Castillo expressed interest in interviewing employees about the election, Morales advised him that the best time to do so was during the shift change, which occurred between 4:30 and 5:30

[1] Castillo previously had interviewed Morales during the production of a program for a community organization unrelated to the union. After that interview, Castillo asked Morales to keep him apprised of union events. Pet. App. 4a-5a, 18a.

p.m. Morales did not have further discussions with Castillo concerning the manner in which ISN would videotape the rally, and neither Castillo nor ISN had any commercial relationship with the Union. *Id.* at 5a, 18a, 19a.

On the day of the rally, Castillo rode with Morales to petitioner's facility. Castillo set up a videocamera (which he borrowed from a community organization) on a corner between the plant and the employee parking lot, about 20 feet from where Morales and O'Neill were distributing leaflets in front of a union banner. Pet. App. 4a, 5a, 18a. No markings on Castillo or his camera indicated his affiliation with ISN. Castillo did, however, wear one of the "Union, Yes" hats that O'Neill and Morales distributed at the rally.

As background material, Castillo filmed the plant, employees entering and exiting the plant and parking lot, and employees accepting or refusing leaflets. When Castillo approached several employees and identified himself as an ISN reporter, each declined to comment about the election. Pet. App. 5a, 19a. As a result, Castillo decided not to use any of his footage; instead, he taped over it without making any copies. *Id.* at 19a.

Castillo was present at petitioner's facility for about an hour and a half. Pet. App. 5a, 18a-19a. In addition to making his ISN affiliation known to employees he attempted to interview, Castillo also properly identified himself to other employees who asked him why he was filming. When employees asked O'Neill who Castillo was, O'Neill explained that Castillo worked for a cable television station. *Id.* at

5a, 19a. Castillo did not distribute any union material or campaign for the Union. *Id.* at 6a, 18a.

2. The following day, the Union won the election by a vote of 114 to 84, with ten challenged ballots. Pet. App. 6a. Petitioner filed objections to the election, including an allegation that Castillo was an agent of the Union, and that his conduct, in videotaping individuals who refused to accept union leaflets, had hindered a free and fair election. *Id.* at 6a, 29a-30a.

After an evidentiary hearing, the Board's hearing officer recommended that the Board set aside the election. Pet. App. 59a. The hearing officer noted that Castillo was transported to and from petitioner's plant by the Union; wore a "Union, Yes" hat while at the site; bore no markings indicating that he was connected to ISN; and conducted his filming in front of a union banner and in the presence of O'Neill and Morales. *Id.* at 47a, 48a. The hearing officer thus determined that "the Union implied to employees that Castillo was one of its members," and that, under the doctrine of apparent authority, Castillo was an agent of the Union. *Id.* at 48a-49a.[2] Applying the Board's standard for evaluating alleged misconduct of parties to elections,[3] the hearing officer concluded that

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[2] See Pet. App. 10a-11a ("To create apparent authority, the principal must either intend to cause the third party to believe that the agent is authorized to act for it, or should realize that its conduct is likely to create such a belief.").

[3] Where alleged misconduct, such as videotaping of employees engaged in campaign activity, is attributable to the union or to the employer, the Board will set aside the election if, in the circumstances presented, that "conduct reasonably tends to interfere with the employees' free and uncoerced choice." *Pepsi-Cola Bottling Co.*, 289 N.L.R.B. 736, 736 (1988). Accord *Sunbelt Mfg., Inc.*, 308 N.L.R.B. 780, 780 n.3 (1992),

Castillo's videotaping warranted setting aside the election. *Ibid.*

The Board rejected the hearing officer's recommendation and certified the Union as the collective bargaining representative of the employees in the stipulated unit. Pet. App. 23a. The Board explained that petitioner had not carried its burden of showing that "the Union had acted in a way to cause reasonable employees to believe that Castillo was its agent." *Id.* at 22a. Specifically, the Board disagreed with the hearing officer that the absence of markings connecting Castillo to ISN, coupled with a hat bearing union insignia, provided a sufficient basis for finding that Castillo acted on apparent authority from the Union. *Id.* at 21a-22a. The Board observed that, if wearing a widely distributed item on which a generalized pro-union statement appears were sufficient to establish an agency relationship, then "anyone who wore an emblem of a party to an election might be deemed an agent of that party." *Id.* at 22a. For similar reasons, the Board found that Castillo's proximity to O'Neill, Morales, and the union banner did not tend to establish an agency relationship. *Ibid.* (noting that "when the identity of the putative agent was questioned, the principal made clear his separate identity"). The Board also pointed out that there was no evidence that petitioner's employees were aware that Morales had given Castillo a ride to and from the plant. *Ibid.*

Having concluded that Castillo was not the Union's agent, the Board assessed Castillo's activity under its

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enforced mem., 996 F.2d 305 (5th Cir. 1993); *Nu Skin Int'l, Inc.*, 307 N.L.R.B. 223, 224 (1992).

standard for evaluating alleged third-party misconduct.[4] The Board concluded that a new election was not warranted, particularly "since a legitimate explanation for the videotaping was offered to at least 20 employees who asked about it." *Id.* at 23a.[5]

When petitioner subsequently refused to bargain, the Union filed an unfair labor practice charge. The Board's General Counsel issued a complaint alleging that petitioner's refusal violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1) and (5). See Pet. App. 7a. The Board, adopting the recommendation of an administrative law judge, ordered petitioner to bargain with the Union. *Millard Processing Servs., Inc.*, 308 N.L.R.B. 929 (1992).

3. The petitioner petitioned for review to the United States Court of Appeals for the Eighth Circuit and the Board applied for enforcement of its order.[6] The court of appeals denied the petition for review and enforced the Board's order. Pet. App. 4a. Noting that "[w]hether an individual was a union agent is a question of fact," *id.* at 10a, the court held that the Board's finding that Castillo did not possess apparent authority to act on the Union's behalf was

[4] Misconduct by a third party must "create[] a general atmosphere of fear and coercion rendering free choice impossible" in order to justify a new election. Pet. App. 22a; *Pepsi-Cola Bottling Co., supra.* Accord *Crown Coach Corp.*, 284 N.L.R.B. 1010, 1011 (1987); *Anchor Inns, Inc.*, 262 N.L.R.B. 1137, 1139 (1982); *Steak House Meat Co.*, 206 N.L.R.B. 28, 29 (1973).

[5] Board Member Raudabaugh dissented, essentially for the reasons stated by the hearing officer. Pet. App. 23a-25a.

[6] The union intervened in support of the Board's order. Pet App. 7a.

supported by substantial evidence. *Id.* at 9a-12a. The court observed that "even engaging in union campaign activity (which Castillo did not do) is insufficient by itself to clothe a person with apparent authority to act on behalf of the union." *Id.* at 11a-12a. The court also noted that both Castillo and O'Neill explained to all employees who inquired that Castillo worked for the media. *Id.* at 12a.

Further, the court of appeals agreed with the Board's conclusion that Castillo's videotaping, as third-party conduct, did not require a new election. Pet. App. 12a-14a. The court observed that the Union offered petitioner's employees a legitimate explanation for Castillo's activity. *Id.* at 13a. The court added that the Board's conclusion was buttressed by the Union's margin of victory, for "conduct during an election campaign must be evaluated in the light of the closeness of the election's outcome." *Id.* at 14a.[7]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner suggests that the court of appeals' decision conflicts with the decisions of two other circuits, as well as prior Board decisions, holding that "surveillance" of employees engaged in protected activity is "inherently inhibiting." Pet. 7-9 (citing

[7] Senior Judge Gibson dissented, arguing that Castillo appeared to employees to be a union representative and that, by filming employees accepting or declining its literature, the Union "created a coercive atmosphere that interfered with the employees' exercise of free choice." Pet. App. 15a.

NLRB v. *Computed Time Corp.*, 587 F.2d 790 (5th Cir. 1979), and *Belcher Towing Co.* v. *NLRB*, 726 F.2d 705 (11th Cir. 1984)). The decisions cited by petitioner, however, do not suggest such a flat rule. See *Belcher Towing Co.*, 726 F.2d at 708 (recognizing that surveillance is "not a per se violation"); *Computed Time Corp.*, 587 F.2d at 794 (finding the surveillance did not constitute a violation). Moreover, each decision cited by petitioner as indicative of a coercive environment turned on specific facts. See *Belcher Towing Co.*, 726 F.2d at 707-709; *Pepsi-Cola Bottling Co.*, 289 N.L.R.B. 736 (1988) (the conduct involved a union agent and the union offered no explanation for the conduct); *Mike Yurosek & Sons, Inc.*, 292 N.L.R.B. 1074 (1989) (same). See also *Nu Skin Int'l, Inc.*, 307 N.L.R.B. 223, 224 (1992) (finding that union photography of employees voluntarily attending a union-sponsored picnic had no reasonable tendency to coerce employees, and distinguishing *Pepsi-Cola* and *Mike Yurosek* on the ground that in those cases the unions had offered the employees no valid explanation for their actions); Pet. App. 13a, 22a.

2. Petitioner contends that, in upholding the Board's finding respecting Castillo's status as a union agent, the court of appeals did not "appropriately consider the importance of [the] employees' reasonable belief as to whether [Castillo] was authorized to act on the Union's behalf." Pet. 10. The court of appeals, however, correctly concluded that "[a]pparent authority results from a manifestation by a principal to a third party that reasonably leads a third party to believe that another person is acting as the principal's agent." Pet. App. 10a. Applying that standard, the court concluded that, in the circum-

stances presented, substantial evidence supported the Board's finding that Castillo was not an agent of the Union.[8] That fact-bound conclusion raises no issue warranting review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[9]

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[8] See Pet. App. 11a-12a; *id.* at 9a ("substantial evidence standard" applies to Board's factual findings "even in those cases in which the Board * * * reverses the decision of the hearing officer"). The Board found that Castillo's mere presence and proximity to the campaign activities did not suggest an agency relationship, especially since both O'Neill and Castillo explained Castillo's independent status to all employees who inquired.

[9] Petitioner also contends that the Board's decision "reflects a double-standard in union management relations" because in "analogous situations" the Board has inferred apparent authority "when an employer acts with the cooperation or in the presence of supervisors." Pet. 10-11. However, in the cases cited by petitioner, see Pet. 11, the Board found that the employer's entire course of conduct led the employees to reasonably believe that anti-union employees were acting on behalf of management. See *Advanced Mining Group*, 260 N.L.R.B. 486, 486 n.3 (1982), enforced mem., 112 L.R.R.M. (BNA) 2793 (D.C. Cir. 1983) (noting that the employer asked employees to join the anti-union group, permitted its members to solicit employees during worktime, and allowed group members to prepare anti-union literature on company time and equipment); *Wm. Chalson & Co.*, 252 N.L.R.B. 25, 33-34 (1980) (in finding that an employee acted with apparent authority from the employer in circulating a decertification petition, the Board noted that the employees reasonably viewed the fellow employee as an agent of management because he openly sought answers to their questions from a supervisor while telling them that it was against the law for the supervisor to discuss the decertification petition with them himself); *Hit 'N Run Food Stores*, 231 N.L.R.B. 660, 669 (1977) (finding that management "instructed [an employee] to get [fellow] employees to demand the return of their [authorization] cards by making clear to

3. Petitioner also asserts that the standard applied by the court of appeals to determine whether third-party conduct invalidates an election conflicts with decisions in other circuits. Pet. 12. After affirming the Board's finding that Castillo was not an agent of the Union, the court of appeals assessed the impact of his videotaping on the employees under the standard appropriate for third party conduct: whether the conduct "created 'an atmosphere of fear and reprisal such as to render a free expression of choice impossible.'" Pet. App. 12a.[10] The cases cited by petitioner as conflicting with this standard either state a similar standard,[11] or involved a different issue.[12]

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them that failure to do so meant the loss of their jobs [and] [t]he employees recognized that he was speaking for management"). Nor does *Haynes Indus., Inc.*, 232 N.L.R.B. 1092, 1099-1100 (1977), stand for the proposition that the Board infers apparent agency whenever the conduct occurs in the presence of union officials and is not disavowed or explained by them. There an anti-union petition was presented to employees for signature on company time in the presence of a company supervisor in circumstances that indicated company approval of the effort.

[10] Moreover, the court agreed with the Board that Castillo's videotaping, in the circumstances here, did not create an atmosphere of fear and reprisal. Thus, the court noted that both the Union and Castillo explained that Castillo worked for a television station to every employee who asked about his identity or whom Castillo attempted to interview, and that the record contains "no evidence of violence or threats or any other facts establishing a coercive atmosphere during the election campaign." Pet. App. 12a, 14a. Petitioner's challenge to that finding (Pet. 11-12) raises an evidentiary issue which does not warrant review by this Court. See *Universal Camera Corp.*, *supra*.

[11] See *NLRB* v. *Golden Age Beverage Co.*, 415 F.2d 26, 32 (5th Cir. 1969) (stating the test as "whether, in the circum-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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stances, the particular conduct complained of created an environment of tension or coercion such as to preclude employees from exercising a free choice").

[12] See *M & M Supermarkets, Inc.* v. *NLRB*, 818 F.2d 1567, 1573-1574 (11th Cir. 1987) (evaluating a third-party appeal to employees' racial or religious prejudices during the election campaign); *DID Building Servs., Inc.* v. *NLRB*, 915 F.2d 490, 497-500 (9th Cir. 1990) (same); *Universal Mfg. Corp.*, 156 N.L.R.B. 1459, 1466 (1966) (addressing impact on an election of newspaper articles that threaten plant closure or other economic consequences should unionization occur); *Hedstrom Co.*, 223 N.L.R.B. 1409 (1976) (same), enforced and remanded on other grounds, 558 F.2d 1137 (3d Cir. 1977).